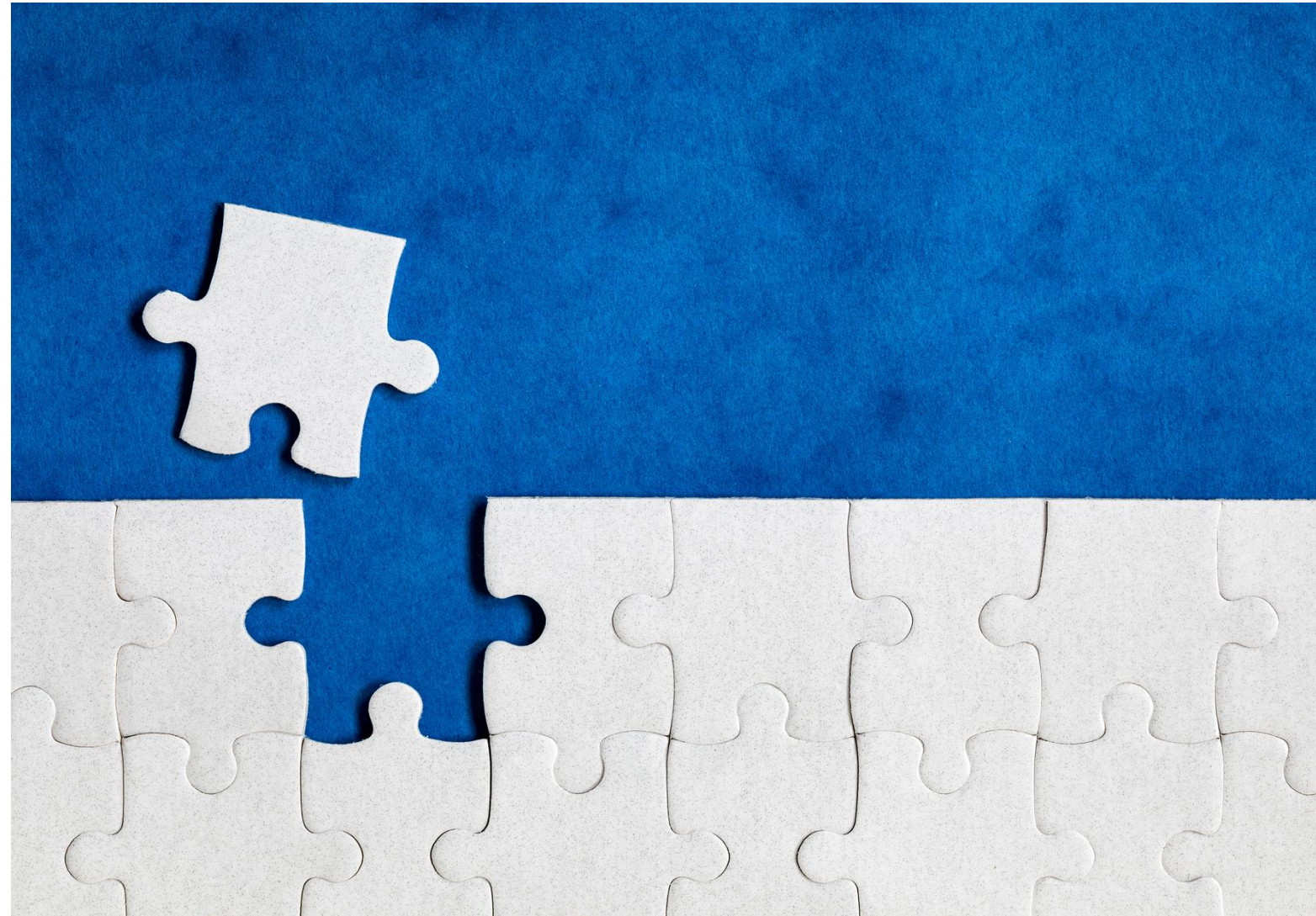




ADREvolution
ADR Services, Inc. 4th Annual MCLE Day
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MENTAL HEALTH, SUBSTANCE ABUSE, AND ATTORNEY COMPETENCE:

WHAT YOU DON'T KNOW **CAN HURT**
YOU!



Presentation by :

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Rule 1.1 Competence

RULE APPROVED BY THE SUPREME COURT, EFFECTIVE MARCH 22, 2021

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this rule, “competence” in any legal service shall mean to apply the (i) learning and skill, and (ii) **mental, emotional, and physical ability** reasonably* necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

This presentation will address responding to competence issues once they are identified.

Formal Opinion 2021-206 Colleague Impairment

Author-Standing Committee on Professional Responsibility
and Conduct of the State Bar

ADVISORY ONLY

Addresses ethical obligations of:

- Impaired lawyer
- Subordinate lawyer
- Supervising lawyer
- Colleague



[HTTPS://WWW.CALBAR.CA.GOV/PORTALS/0/DOCUMENTS/ETHICS/OPINIONS/FORMAL-OPINION-NO-2021-206-COLLEAGUE-IMPAIRMENT.PDF](https://www.calbar.ca.gov/portals/0/documents/ethics/opinions/formal-opinion-no-2021-206-colleague-impairment.pdf)



SUMMARY OF FACTUAL SCENARIO

Cast of Characters



IMPAIRED LAWYER

- Senior partner
- Successful trial lawyer
- Rainmaker
- Litigating major case for important client

SUBORDINATE LAWYER

- 5th year associate assigned to the case
- Concerned about Impaired Lawyers behavior



- Confused about the case
- Misses client meetings without explanation
- Delays in responding to client inquiries
- Discusses facts and strategies that don't apply to the case
- Argues with client
- Impaired lawyer at summary judgment hearing:
 - Frazzled and confused
 - Cites to inapplicable facts and law
 - Subordinate lawyer to step in and argue motion – ultimately denied
- Written settlement offer
 - Impaired lawyer ignores offer
- Fails to communicate it to client
- Subordinate lawyer sees follow-up letter from opposing counsel
- Letter says deadline passed and offer had expired

Subordinate Lawyer is Concerned About Impaired Lawyer's Behavior





Subordinate lawyer raises concerns directly with Impaired lawyer

Impaired Lawyer:

- Denies problem
- Admonishes Subordinate lawyer for suggesting otherwise
- Heavy case load

Contentious Divorce

Instructs subordinate not to raise concerns with client

Responsibilities of the Impaired Lawyer

COMPETENCE AND DILIGENCE

Rule 1.1(b)

- Learning and skill, and
- Mental, emotional, and physical ability
- Reasonably necessary for the performance of the service in question

Rule 1.1(a)

What is a rule violation:

- Intentionally, recklessly, with gross negligence, or repeatedly
- Fail to perform legal services with competence or diligence.”
- No actual harm to client required
- Not excuses per case law:
 - Heavy case load
 - Mental or emotional strain
 - Controlled substance use
 - Financial pressures

Communication With Client

- Rule 1.4(a)(1): Prompt disclosure of information to client
- Rule 1.4(a)(2): Reasonable consultation with client re strategy
- Rule 1.4(a)(3) and B&P 6068)(m): Reasonable explanation for informed decisions





Personal Interest Conflict

- Rule 1.7(b) Reasonable belief in abilities
- Rule 1.7(d): Written consent

What Should the Impaired Lawyer Do?

DETERMINE

- Determine whether & acknowledge if they have a problem
- [Lawyers Assistance Program \(LAP\)](#)

ASK FOR HELP

- Notify other attorneys at the firm – ask for help

CASE

Possible actions regarding the case include:

- Turn duties to a colleague
- Associate other counsel (depends on circumstance)
- Refer to other counsel
- Terminate relationship

Responsibilities of Subordinate Lawyer



Rule 5.2(a)

Rule 5.2(a) requires compliance with State Bar rules “notwithstanding that the lawyer acts at the direction of another lawyer or other person”

Reasonable Resolution

No violation if acts on supervisor’s “reasonable resolution of an arguable question of professional duty”

Remedies

- Notify supervisory lawyers in the firm
- Still may need to follow-up if supervisors do not act – independent duty

Large Firm Remedies



NOTIFY SUPERVISORY LAWYERS IN THE FIRM



- IN-HOUSE ETHICS COUNSEL
- Members of ethics or risk-management committee
- Senior partner in charge of the matters at issue
- Other senior lawyer

What if subordinate lawyer works in *small firm*?

Must act in accordance with *own obligations*

Communicate with client!

- Must respect Impaired lawyer privacy
- Must focus on the conduct specific to the case
- May need to recommend course of action – associate in another attorney; refer matter to another attorney

Remedies

- Speak with the impaired partner
- Speak with a managing partner if there is one – get cover
- Call Ethics Hotline of State Bar or local bar association (not a defense, but could be mitigation)
- Lawyers Assistance Program

Responsibilities of Other Lawyers in Firm

If know of impairment and conduct must take steps to:

- Protect client
- Ensure impaired lawyer complies with ethical rules

Remedies

- Notifying manager or supervisor
- Confronting impaired lawyer
- Notifying client
- Referring client to new counsel

Responsibilities of Supervisors and Managers

Rule 5.1(a)-(b)

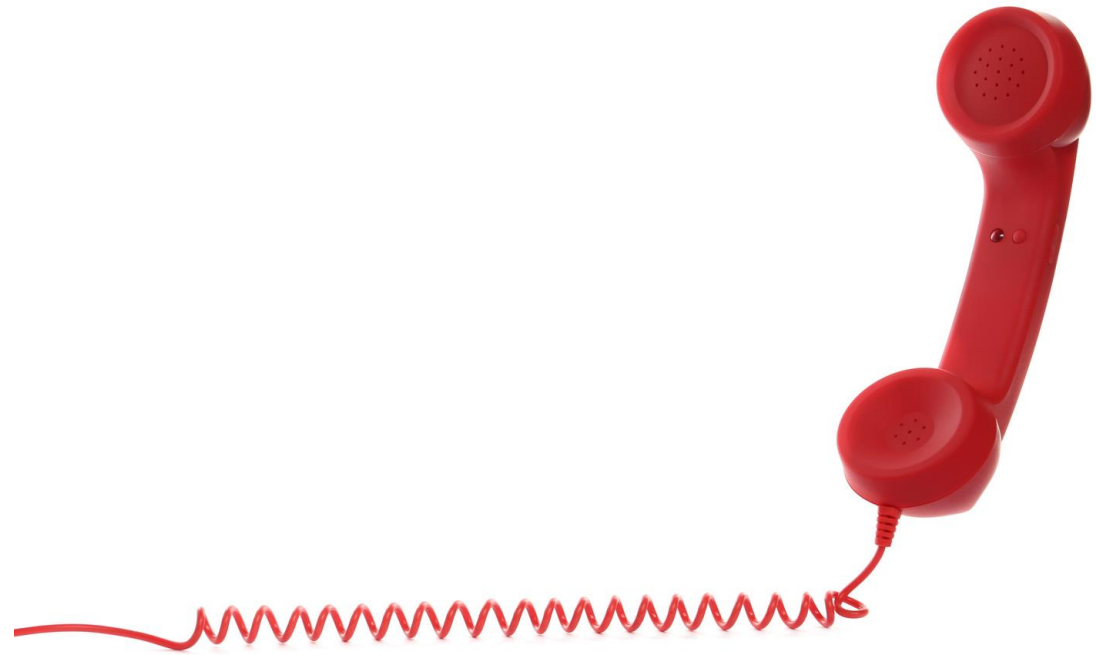
- Responsible for firm compliance

Rule 5.1(c)

May be responsible if:

- Orders the conduct
- Ratifies the conduct with actual or constructive knowledge of the conduct

Prompt and comprehensive investigation before communicating with client, absent exigent circumstances



Recommendation (in opinion): Clear Policies and Procedures

- Hotline
- Neutral firm representative – HR?
- Accommodations to the impaired lawyer
- Impaired lawyer must get assistance as condition of staying with the firm

Takeaways

01

Find out your firm's policy is (if there isn't one, make one!)

02

Recognize the problem

01

Understand Your Ethical Duties – What You Don't Know **Can** Hurt You

- YOU
- COLLEAGUE
- SUBORDINATE
- SUPERVISOR

01

Take action at the earliest possible time

01

Get Help



Thank You



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Resources



- Lawyer Assistance Program
<https://www.calbar.ca.gov/Portals/0/documents/ConsumerInformation/Lawyer-Assistance-Program-Pamphlet.pdf>
- Self-Assessment Tests
 - Substance Abuse Twenty Questions https://www.calbar.ca.gov/portals/0/documents/lap/LAP_20-Questions-Test.pdf
 - Anxiety Assessment
<https://www.calbar.ca.gov/LinkClick.aspx?fileticket=E1g8AzwY55o%3d&tabid=1183>
 - Depression Assessment <https://www.calbar.ca.gov/LinkClick.aspx?fileticket=pVSL-D-ivX4%3d&tabid=1183>